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No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1986

THE STATE OF TEXAS,

Petitioner,

v.

MATHIS CARL WILLIAMS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

I. WHETHER IT IS CONSTITUTIONALLY PERMISSIBLE FOR A STATE LEGISLATURE TO PROVIDE FOR THE MANDATORY REVOCATION OF PAROLE FOR A PAROLEE WHO IS CONVICTED OF A NEW CRIME AND SENTENCED TO A PERIOD OF INCARCERATION?

II. WHEN PAROLE IS REVOKED ON THE BASIS OF A NEW CONVICTION AND SENTENCE OF IMPRISONMENT, IS DUE PROCESS SATISFIED BY THE SAFEGUARDS OF THE CRIMINAL TRIAL OR MUST A SEPARATE PAROLE REVOCATION HEARING BE HELD?

III. WHEN PAROLE IS REVOKED ON THE BASIS OF A NEW CONVICTION AND SENTENCE OF IMPRISONMENT, IS DUE PROCESS SATISFIED BY THE SAFEGUARDS OF THE CRIMINAL TRIAL COUPLED WITH THE OPPORTUNITY TO PRESENT, IN WRITING, ANY OTHER INFORMATION WHICH THE PAROLEE WISHES THE PAROLE AUTHORITY TO CONSIDER?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, petitioner[1] herein, by and through the Attorney General of Texas, and files this Petition for Writ of Certiorari.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is attached hereto as Appendix A. *Ex parte Williams*, ____ S.W.2d ____, No. 69,732 (Tex. Crim. App. Feb. 11, 1987).

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on February 11, 1987. This petition for writ of certiorari is filed within sixty days after final judgment in the court below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

1. For clarity, petitioner in this Court and respondent below, the State of Texas, will be referred to as "the state." Respondent in this Court and petitioner below, Mathis Carl Williams, will be referred to as "Williams."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV, provides, in pertinent part, as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Tex. Code Crim. Proc. Ann. art. 42.12 § 22 (Vernon Supp. 1986) provides, in pertinent part, as follows:

> Whenever a parolee, mandatory releasee, or a person granted a conditional pardon is accused of a violation of his parole, mandatory supervision, or conditional pardon on information and complaint by a law enforcement officer or parole officer, he shall be entitled to a conditional right to be heard on such charges before the Board or its designee under such rules and regulations as the Board may adopt; providing, however, said hearing shall be a pubic hearing and shall be held within 70 days of the date of service of a summons by the Board or of arrest under a warrant issued by the Board of Pardons and Paroles and at a time and place set by the Board; and provided further, when the Board learns that a parolee, mandatory supervisee, or a person granted a conditional pardon has been convicted in a court of competent jurisdiction of a felony offense committed while an administrative releasee and has been sentenced by the court to a term of incarceration in a penal institution, the Board may consider evidence of those facts to be a sufficient hearing and revoke the parole or mandatory supervision or recommend to the Governor revocation of a conditional pardon without any further hearing.

Tex. Admin. Code Title 37, § 145.41 (Hart Information Systems, Inc. 1985) provides as follows:

> (a) At such time as the [Texas Board of Pardons and Paroles] learns of an allegation of violation of one

or more terms and conditions of release by an administrative releasee, the board shall refer the matter to a parole panel for review and initial determination of disposition.

(b) A parole panel shall review the information and make an initial determination to:

(1) request the governor to order the issuance of a prerevocation warrant;

(2) order the issuance of a notice of allegation of administrative release violations;

(3) continue the release of the alleged violator pending disposition of any charges;

(4) make final disposition of the matter by continuation of release under the same or modified conditions; or

(5) recommend revocation and request the governor to issue a revocation warrant, provided that this action shall be taken only when the releasee has committed a felony offense during the time of his or her release and has been convicted at the trial court level and sentenced to penal incarceration for the offense, whether said conviction is appealed or not.

(A) Revocation of administrative release under this paragraph shall be accomplished administratively and a releasee proceeded against under this paragraph shall not be entitled to an administrative release revocation hearing.

(B) After the panel has acted under this paragraph, further proceedings shall be in accord with Sec. 145.53 of this title [relating to Revocation of Administrative Release (Parole, Mandatory Supervision) Recommendation; Proclamation; Warrant].

(C) Should the releasee's conviction be reversed

> by a court of competent jurisdiction, then he or she shall be entitled to reinstatement of the administrative release previously revoked under this paragraph, upon notification of the board of said judicial action and provision to the board of certified copy of the judicial order effectuating the reversal; provided, however, that the board may proceed against a releasee reinstated under this subsection on the basis of any of the allegation(s) of violation previously filed against the releasee but not yet disposed of.

STATEMENT OF THE CASE

On February 1, 1982, Williams pled guilty to two counts of aggravated robbery in Cause No. 347511 in the 182nd District Court of Harris County, Texas, and was sentenced to imprisonment for seven years. On May 29, 1984, Williams was released on parole.[2] On December 3, 1985, while on parole, Williams committed the offense of unauthorized use of a motor vehicle. On January 8, 1986, Williams pled *nolo contendere* to that offense in Cause No. 438271 in the 248th District Court of Harris County and was sentenced to imprisonment for three years.

On April 11, 1986, Williams received written notice from the Texas Board of Pardons and Paroles (hereinafter "the Board") that his parole was to be revoked on the basis of his new conviction for unauthorized use of a motor vehicle. *See* Appendix A at 1-2. The letter stated that "[t]his conviction is sufficient proof of a violation of one or more rules of your conditional release and, as such, is grounds for revocation of your release."

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2. Williams was released on a form of parole referred to in Texas law as "mandatory supervision." Mandatory supervision differs from parole only in that it is within the Board's discretion to release an inmate on parole whereas release on mandatory supervision is automatic once the inmate has accrued a certain amount of calendar time and "good time" credits. Tex. Code Crim. Proc. Ann. art. 42.18 § 8(b), (c) (Vernon Supp. 1986). In any event, Texas law provides that "[a] prisoner released to mandatory supervision shall, upon release, be deemed as if released on parole." *Id.* § 8(c). Thus, for purposes of this case, there is no distinction between mandatory supervision and parole, as is evident from the Texas court's reference to Williams having been "paroled." Appendix A at 1.

Id. at 2. The letter also advised Williams that "[t]here will not be a formal hearing. If you wish any additional information to be considered, before this action is taken, you must send such information to [the Board] to arrive no later than May 11, 1986." *Id.* Williams did not send any further information to the Board, and on June 16, 1986, his parole was revoked.

Williams then filed an application for state habeas relief contending that he was denied due process by the manner in which his parole was revoked and challenging the constitutionality of the statute and Board regulation which provided for the "automatic revocation" of his parole on the basis of his new conviction. On February 11, 1986, solely on federal constitutional grounds,[3] the Texas Court of Criminal Appeals vacated the order revoking Williams' parole and held that he "is entitled to a final revocation hearing . . . ." Appendix A at 7.

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

The questions presented are profoundly important to the states' administration of their criminal justice systems. The rule allowing for the mandatory revocation of parole based on a new conviction and term of imprisonment is "economical, logical and reasonable . . . ." *Ex parte Maceyra*, 690 S.W.2d 572, 575 (Tex. Crim. App. 1983). Under the holding of the court below, the state legislatures are foreclosed from providing for the mandatory revocation of parole on this basis even though there is no substantive due process override which requires that the states consider mitigating evidence. The impact on the states' financial resources is immense. Of the 9,376 parole

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3. It is clear from the Texas court's opinion that its decision was not based on state law. "Applicant relies solely upon the Due Process Clause of the Fourteenth Amendment, which provides: '[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .' U.S. Const. amend. XIV. No state constitutional provisions were raised in the application." Appendix A at 1 n.1.

revocations in Texas alone during the calendar year 1986, the Executive Director of the Board estimates that at least fifty per cent were done without a hearing on the basis of a new conviction. Nor is the problem limited to Texas. Ten other states have similar statutes. *See* Appendix B. A decision by this Court approving the Texas parole revocation scheme would likewise uphold the validity of other states' statutes and would allow yet additional states to enact similar statutes without the threat of constitutional attack.

Moreover, the judgment of the Texas court is in irreconcilable conflict with the judgment of the Louisiana Supreme Court in *State ex rel. Bertrand v. Hunt*, 308 So.2d 760 (La. 1975).[4] The issue presented is one which the Court expressly reserved in *Moody v. Daggett*, 429 U.S. 78, 86 (1976). Where, as here, the highest courts of two states are divided on a substantial issue of federal constitutional law, the Court should exercise its certiorari jurisdiction to resolve the conflict. *See Fuller v. Oregon*, 417 U.S. 40, 42 & n.3 (1974).

Finally, the writ should be granted because a state court of last resort has incorrectly decided an important point of federal constitutional law. The court below took an overly expansive view of the Due Process Clause in holding that *Morrissey v. Brewer*, 408 U.S. 471 (1972), requires a final revocation hearing when parole is revoked on the basis of a new conviction. The Court should exercise its certiorari jurisdiction in order to delineate what the Constitution demands in this particular procedural setting. *See Oregon v. Kennedy*, 456 U.S. 667, 668-69 (1982) (certiorari granted because state court took an "overly expansive view of the Double Jeopardy Clause"); *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read *Miranda* too broadly").

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4. Other courts have adopted the view taken by the Texas court. *See, e.g., Heinz v. McNutt*, 582 F.2d 1190 (9th Cir. 1978); *Moss v. Patterson*, 555 F.2d 137 (6th Cir. 1977); *In re Akridge*, 581 P.2d 1050 (Wash. 1978).

II.

DUE PROCESS IS NOT OFFENDED BY THE AUTOMATIC REVOCATION OF PAROLE UPON CONVICTION AND INCARCERATION FOR A NEW OFFENSE.

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court held that the conditional freedom of a parolee is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment which may not be terminated absent appropriate due process safeguards. Under *Morrissey*, the parolee is entitled to a preliminary hearing to determine whether there is probable cause to believe that a parole violation has been committed and a final hearing to evaluate any contested, relevant facts and consider whether those facts warrant revocation. *Id.* at 485-88. The court below found that the criminal proceedings which gave rise to Williams' new conviction satisfied the *Morrissey* requirement of a preliminary hearing but that a final hearing was nonetheless required because Williams "has not had an opportunity to litigate the appropriateness of revoking his parole before the parole board or its agent." Appendix A at 7.

In *Moody v. Daggett*, 429 U.S. 78 (1976), the Court was faced with a situation similar to the case at bar, *i.e.*, a parolee who had been convicted of a new offense and reincarcerated on the basis of his new conviction. The Court held that under such circumstances, "there is no need for the preliminary hearing which *Morrissey* requires upon arrest for a parole violation." *Id.* at 86 n.7. The Court also held that, where Congress had provided a statutory right to a final hearing, it need not be conducted until the parolee was taken into custody as a parole violator by execution of the warrant. *Id.* at 89. *Moody* involved a statute which provided for a final hearing even where the parolee had been convicted of a crime committed while on parole, *id.* at 86 n.8, and therefore the Court did not reach the question "whether a *Morrissey*-type hearing will ever be constitutionally required in the present case . . . ." *Id.* at 86. It is that issue which is now before the Court.

In holding that Williams is entitled to a final hearing, the Texas court failed to distinguish between the Iowa discre-

tionary procedures at issue in *Morrissey* and the mandatory revocation of parole provided for by Texas law when a parolee is convicted of a new crime and sentenced to incarceration. Under both the Iowa and Texas schemes, parole *may* be revoked on the basis of any of a number of violations. Given "[t]his discretionary aspect of the revocation decision," *Morrissey,* 408 U.S. at 483, due process requires that the parolee be afforded an opportunity to persuade the parole authority to exercise its discretion in his favor and continue him on parrole rather than return him to incarceration.

The instant case is significantly different. Where, as here, the state legislature has made the sovereign decision that parole *shall* be revoked whenever a parolee is convicted and sentenced to prison for a felony committed while on parole, the revocation process is stripped of its discretionary nature. Because the parole authority has no discretion whatsoever in the matter, there is no need to conduct a final hearing.

Nor is there any constitutional infirmity in the state statute and regulation providing for the mandatory revocation of parole under these circumstances. One need look no further than this Court's decisions upholding the states' habitual offender statutes to reach this conclusion. *See, e.g., Spencer v. Texas,* 385 U.S. 554, 560 (1967). It is permissible to impose a mandatory life sentence pursuant to these statutess following three or more felony convictions because the states have a legitimate interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel v. Estelle,* 445 U.S. 263, 276 (1980).

The states also have "an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." *Morrissey,* 408 U.S. at 483. Here, as in the case of an habitual offender, the states should be free to provide that a combination of past and continued criminal conduct will invariably result in the imposition of a particular sanction. *See Morrissey,* 408 U.S. at 478 (conditions of parole "prohibit, either absolutely or conditionally, behavior

that is deemed dangerous to the restoration of the individual into normal society.").

Moreover, viewed from the perspective of the criminal offender, the undesirable consequences which flow from the Texas "automatic revocation" rule pale in comparison to the mandatory life sentence provided by the recidivist statutes upheld in *Spencer* and *Rummel*. Under those statutes, an accused may have fully discharged his obligations to the state for two prior felony convictions and nonetheless be sentenced to life imprisonment on the basis of those two convictions plus a new felony conviction. In the instant case, the parolee's new conviction and sentence have a relatively inconsequential result: he is simply required to return to prison to serve out the term of incarceration previously imposed. *See Morrissey*, 408 U.S. at 480 ("Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.").

III.

WILLIAMS RECEIVED A FINAL REVOCATION HEARING WITHIN THE MEANING OF *MORRISSEY V. BREWER.*

Parole revocation proceedings are not a part of the criminal prosecution, and thus the parolee is not entitled to the full panoply of constitutional and statutory rights due a defendant facing a criminal prosecution. *Morrissey*, 408 U.S. at 480. Where, as here, the revocation of parole is based on a new criminal conviction and sentence of imprisonment, it cannot be gainsaid that the criminal proceedings which led to the new conviction have effectively afforded the parolee more extensive procedural safeguards than he is due under *Morrissey*. That was the conclusion of the Louisiana Supreme Court in *State ex rel. Bertrand v. Hunt*, 308 So.2d 760 (La. 1975):

> [T]he final revocation hearing could be nothing but superfluous since there is only one conclusion that can be reached by the hearing body—that the parolee was in fact convicted of other crimes while on parole and

> that his conviction constitutes a violation of one of the conditions of parole.
>
> This conclusion is further supported by the fact that the arrest and prosecution of a parolee for a criminal offense is, in itself, adequate protection against the evils and possible abuses which *Morrissey* was intended to guard against. The parolee's trial in a court of law, under the strict standards of proof required in a criminal prosecution and the rules of evidence and procedure which apply to such a proceeding, afford the parolee far more protection than do the procedures set forth in *Morrissey*.

Id. at 763. The reasoning of the Louisiana court is logical, practical, and fully consistent with the admonition of *Morrissey* that "a parolee cannot relitigate issues determined against him in other forums, such as in the situation presented when the revocation is based on conviction of another crime." *Id.* at 490.

In holding to the contrary, the Texas court found that Williams has a due process right "to appear at a revocation hearing and present mitigating evidence showing why the violation should not result in revocation of his parole." Appendix A at 5. The court below thus misread *Morrissey* in two significant respects. First, the court unfairly denigrated Williams' opportunity to present mitigating evidence at his criminal trial. Under Texas law, Williams had a statutory right to present evidence in mitigation of punishment as to voluntary intoxication[5] as well as a due process right to present any other mitigating evidence.[6] In addition, Texas law provides criminal defendants with a statutory right to allocution before the pronouncement of sentence.[7] Any evidence Williams might present to the parole authority could have been offered at the criminal proceedings which gave rise to his new conviction.

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5. Tex. Penal Code Ann. § 8.04(b) (Vernon 1974); *Seek v. State*, 646 S.W.2d 557, 561 (Tex.App.-Houston (1st) 1982).

6. *Duhart v. State*, 668 S.W.2d 384, 387 (Tex. Crim. App. 1984).

7. Tex. Code Crim. Proc. Ann. art. 42.07 (Vernon 1974); *Tenon v. State*, 563 S.W.2d 622, 623 (Tex. Crim. App. 1978).

It is extremely significant, therefore, that Williams offered no mitigating evidence at trial or in response to the Board's subsequent written invitation for him to do so. Indeed, he never has suggested that there is any reason why the parole authority might have been persuaded to continue him on parole. Under these circumstances, the "hearing" ordered by the court below is a hollow exercise in formalism which unfairly requires expenditure of the state's resources and avails the parolee nothing. *See Moody v. Daggett*, 429 U.S. at 96 n.12 (Stevens, J., dissenting) ("If justification for the revocation is established by a new conviction, there would seldom be need for a hearing on the discretionary aspects of revocation—certainly not unless strong mitigating circumstances were identified.").

Second, the court below completely discounted the opportunity afforded Williams to present evidence to the Board prior to the revocation of his parole. The court found that this procedure "did not rise to the level of the procedural guarantees of personal appearance, presentation of witnesses, confrontation and cross-examination as required by *Morrissey v. Brewer.*" Appendix A at 7 n.7. But all of those safeguards, and more, were afforded Williams at his criminal trial.

Because Williams had been convicted and sentenced in full compliance with the Constitution, and because his parole was thereby subject to mandatory revocation under Texas law, the only issue left to determine was identity. There is, of course, no quesion that the Mathis Carl Williams whose parole was revoked on his conviction in Cause No. 347511 is the same Mathis Carl Williams who was convicted in Cause No. 438271. If there had been any dispute as to identity, Williams could have easily raised the matter before the Board by producing documentary evidence or by simply asserting as much. He did not do so. The panoply of constitutional rights accorded Williams in the criminal prosecution, coupled with the opportunity to provide additional information to the Board, more than satisfied the requirements of *Morrissey.*

In holding to the contrary, the court below accorded talismanic significance to the word "hearing." A "hearing" need not encompass the actual physical presence of the parties in

order to pass constitutional muster. The Court has so held in the context of the type of state court hearing required by the habeas corpus statute, 28 U.S.C. § 2254(d), which entitles the state court's factual findings to a presumption of correctness. *Sumner v. Mata*, 449 U.S. 539, 546 (1981) (California appellate court "clearly held a 'hearing' within the meaning of § 2254(d)" when it decided case after review of the trial record.). Indeed, at least one member of the Court has opined that the parolee's presence at a *Morrissey* hearing is not necessary. *Moody v. Daggett*, 429 U.S. at 96 n.12 (Stevens, J., dissenting) ("Nor would I require that the prisoner's interest in a reasonably prompt determination of his status always mandate a personal appearance either at the place of his incarceration or at the place where the parole board normally sits."). Williams was afforded a final hearing within the meaning of *Morrissey v. Brewer*.

CONCLUSION

For these reasons, the state prays that the petition for writ of certiorari issue.

Respectfully submitted,

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APPENDIX A

Ex parte MATHIS CARL WILLIAMS **Habeas Corpus Application**

No. 69,732 **From HARRIS County**

OPINION

This is a post-conviction application for a writ of habeas corpus. See Art. 11.07, V.A.C.C.P. The application was ordered filed and set to determine whether applicant was denied due process[1] when the Board of Pardons and Paroles, without holding a hearing, ordered applicant's parole revoked after determining that he had been convicted of a felony offense and sentenced to a term of imprisonment while on parole. Applicant also challenges the constitutionality of Article 42.12, § 22, V.A.C.C.P. (Supp. 1986), and the automatic revocation rule, Bd. of Pardons and Paroles, 37 Tex. Admin. Code, § 145.41 (Hart Information Systems, Inc. 1985). We will grant relief.

I.

On February 1, 1982, applicant was convicted of the felony offense of robbery and sentenced to seven (7) years confinement in the Texas Department of Corrections. Subsequently, applicant was paroled. However, on January 8, 1986, following a plea of no contest, applicant was convicted of the felony offense of unauthorized use of a motor vehicle. The trial court sentenced applicant to three (3) years confinement in the Texas Department of Corrections.

On April 11, 1986, applicant received the following letter from the Board of Pardons and Paroles:

> Dear Mr. Williams:
>
> It has recently come to the attention of the Board

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1. Applicant relies solely upon the Due Process Clause of the Fourteenth Amendment, which provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV. No state constitutional provisions were raised in the application.

> of Pardons and Paroles that you have been convicted of a felony offense which was committed while you were under the jurisdiction of the Board on administrative release status and were sentenced to the term of 3 years confinement in the Texas Department of Corrections.
>
> This conviction is sufficient proof of a violation of one or more rules of your conditional release and, as such, is grounds for revocation of your release.
>
> This letter is NOTICE to you that pursuant to law and rules of this Board, your administrative release status will be Revoked based on said violation as shown by a true copy of your conviction dated 1-8-86 in the Dist. Court of Harris County, Texas. This Revocation will be administratively processed within thirty (30) days of the date of this letter. *There will not be a formal hearing.* If you wish any additional information to be considered, before this action is taken, you must send such information to the Director, Hearing Section, P.O. Box 13401; Capitol Station, Austin, Texas 78711, to arrive no later than May 11, 1986.

(R. 1-8) (emphasis added). The State concedes that on June 16, 1986, the Board of Pardons and Paroles (hereinafter "Board") revoked applicant's parole on his robbery conviction. (R. I-13).

II.

Applicant argues that the Board unconstitutionally revoked his parole when it denied him the opportunity to participate in a hearing before the Board prior to its final decision. In support of his argument, applicant cites Morrissey v. Brewer, 408 U.S. 741, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), which established the federal due process requirements for parole revocation.

The State argues that the Board's own rules permitted it to revoke applicant's parole without allowing applicant to participate in a hearing because he had been convicted for a felony

offense while on parole. See § 145.41, supra.[2] Furthermore, the State argues that the Legislature amended Article 42.12, § 22, V.A.C.C.P., in 1985 to authorize the Board to promulgate such a rule. See Acts 1985, 69th Leg., ch. 508, § 1, p. 4213, eff. Aug. 26, 1985.[3] The State concludes that the Board's

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2. Section 145.41, in pertinent part, provides:

(a) At such time as the Board learns of an allegation of violation of one or more terms and conditions of release by an administrative releasee, the Board shall refer the matter to a parole panel for review and initial determination of disposition.

> (b) A parole panel shall review the information and make an initial determination as to:
>
> * * *
>
> (5) recommend revocation and request the governor to issue a revocation warrant, provided that this action shall be taken only when the releasee has committed a felony offense during the time of his or her release and has been convicted at the trial court level and sentenced to penal incarceration for the offense, whether said conviction is appealed or not.
>
> > (A) Revocation of administrative release under this paragraph shall be accomplished administratively and a releasee proceeded against under this paragraph shall not be entitled to an administrative release revocation hearing.

3. The State concedes that prior to this amendment the Board had no statutory authority to revoke a defendant's parole without first holding a hearing, regardless of the basis for the revocation. See Art. 42.12, § 22, V.A.C.C.P. (1979); Ex parte Glenn, 690 S.W.2d 578 (Tex.Cr.App. 1985); Ex parte Maceyra, 690 S.W.2d 572 (Tex.Cr.App. 1985). However, the amended portion of Article 42.12, § 22, supra, in pertinent part, now provides:

> Whenever a parolee ... is accused of a violation of his parole ... on information and complaint by a law enforcement officer or parole officer, he shall be entitled to a conditional right to be heard on such charges before the Board or its designee under such rules and regulations as the Board may adopt; providing, however, said hearing shall be a public hearing and shall be held within 70 days of the date of services of a summons by the Board or of arrest under a warrant issued by the Board of Pardons and Paroles and at a time and place set by the Board; and provided further *when the Board learns that a parolee ... has been convicted in a court of competent jurisdiction of a felony offense committed while an*

(footnote 3 continued on next page)

denial of a hearing pursuant to Article 42.12, § 22, supra, and § 145.41, supra, does not violate due process requirements. We disagree.

In *Morrissey v. Brewer*, supra, the Supreme Court reviewed both the parolee's and the State's interests in parole,[4] and concluded that the Due Process Clause provides a parolee with several procedural rights before his parole can be revoked.

> [A] parole may not be revoked, consistently (sic) with the Due Process Clause, unless the parolee is afforded, first, a preliminary hearing at the time of arrest to determine whether there is probable cause to believe that he has violated his parole conditions and, second, a final hearing within a reasonable time to determine whether he has, in fact, violated those conditions and whether his parole should be revoked. For each hearing the parolee is entitled to notice of the violations alleged and the evidence against him, opportunity to be heard in person and to present witnesses and documentarry evidence, and the right to confront and cross-examine adverse witnesses, unless it is specifically found that a witness would

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(footnote 3 continued from previous page)
administrative releasee and has been sentenced by the court to a term of incarceration in a penal institution, the Board may consider evidence of those facts to be a sufficient hearing and revoke the parole ... without any further hearing.

4. A parolee has a substantial liberty interest, despite the conditions attached to his freedom. "In many cases, the parolee faces lengthy incarceration if his parole is revoked." 408 U.S. at 482, 92 S.Ct. at 2601, 33 L.Ed.2d at 495. The State has several interests. Although the State has an "overwhelming" interest in returning an unsuccessful parolee to prision without the burden of a new trial, it "has no interest in revoking parole without some informal procedural guarantees." 408 U.S. at 483, 92 S.Ct. at 2601, 33 L.Ed.2d at 495. Furthermore, "[s]ociety ... has an interest in not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions." 408 U.S. at 484, 92 S.Ct. at 2601, 33 L.Ed.2d at 496 (citations omitted). Finally, society has a strong interest in treating a parolee fairly: "fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." 408 U.S. at 484, 92 S.Ct. at 2602, 33 L.Ed.2d at 496 (footnote omitted).

> thereby be exposed to a significant risk of harm. Moreover, in each case the decisionmaker must be impartial, there must be some record of the proceedings, and the decisionmaker's conclusions must be set forth in written form indicating both the evidence and the reasons relied upon.

408 U.S. at 491-92, 92 S.Ct. at 2605, 33 L.Ed.2d at 500-01 (Brennan, J., concurring) (summarizing Part III (a) & (b) of the majority opinion).

The second, or final revocation hearing, provides a parolee with "an opportunity to be heard and to show, if he can, that he did not violate the conditions, or *if he did*, that circumstances in mitigation suggest that the violation does not warrant revocation."[5] 408 U.S. at 489, 92 S.Ct. at 2603, 33 L.Ed.2d at 499 (emphasis added). Once a parolee has been convicted of a felony offense and sentenced to a term of imprisonment, then the issue of whether a condition of parole has been violated has been litigated and need not be relitigated in a revocation hearing. 408 U.S. at 491, 92 S.Ct. at 2605, 33 L.Ed.2d at 500. However, a parolee still has a right to appear at a revocation hearing and present mitigating evidence showing why the violation should not result in revocation of his parole. Heinz v. McNutt, 582 F.2d 1190 (9th Cir. 1978); Moss v. Patterson, 555 F.2d 137 (6th Cir. 1977); see also In re Akridge, 90 Wash.2d 350, 581 P.2d 1050 (1978). Cf. Reese v. United States Board of Parole, 530 F.2d 231 (9th Cir. 1976), cert. denied, 429 U.S. 999, 97 S.Ct. 525, 50 L.Ed.2d 609 (allowing delay in final revocation hearing under some circumstances).

In *Heinz v. McNutt*, the Ninth Circuit Court of Appeals analyzed a Washington state statute, Wash. Rev. Code § 9.95.120 (1974), to determine whether it provided a parolee with the due process guarantees established in *Morrissey v. Brewer*, supra. 582 F.2d at 1192. Pursuant to that statute, the Washington Board of Prison Terms and Paroles had revoked the petitioner's parole without a hearing; the basis for the parole

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5. No issue is raised concerning applicant's right to a preliminary hearing. But cf. Moody v. Daggett, 429 U.S. 78, 97 S.Ct. 274, 50 L.Ed.2d 236 (1976).

revocation had been the commission of, and conviction for, a felony which resulted in a term of imprisonment. *Id.* The Court of Appeals found that the sentencing hearing for the parolee's conviction was not an effective substitute for a parole revocation hearing because "[p]arole revocation considerations may differ from those involved in the sentencing for a criminal conviction." 582 F.2d at 1194 (footnote omitted). In addition, the procedural safeguards provided in the sentencing portion of a criminal trial do not include all of the safeguards required by *Morrissey v. Brewer*, supra. For example, a parolee does not receive any written notice of the reasons for denying continued parole. *Id.* at n.4. The Court of Appeals concluded that the Washington statute was unconstitutional "insofar as it permits automatic revocation of parole without a final *Morrissey* hearing for felons who are incarcerated as a result of their convictions." *Id.* at 1194.

Only a few days earlier, the Supreme Court of Washington had reached the same conclusion in construing the *same* statute. *In re Akridge*, supra. That Supreme Court held that "*Morrissey* requires that the parolee have an opportunity to explain why a subsequent conviction should not result in parole revocation." 581 P.2d at 1052. In addition, it held that such a hearing must take place before "the body vested with parole revocation authority—the board," at least until the legislature authorizes some other body to hold such a hearing. *Id.*[6]

We acknowledge that a parolee who has been convicted of a felony offense while on parole and sentenced to a term of imprisonment might not be continued on parole even if given an opportunity to offer mitigating circumstances. However, "the right to a hearing does not depend upon a demonstration of certain success." Carey v. Piphus, 435 U.S. 247, 266, 98 S.Ct. 1042, 1053, 55 L.Ed.2d 252, 266 (1978) (addressing right to hearing prior to deprivation of property); see also Cleveland Bd. of Education v. Loudermill, ___U.S.___, ___, 105 S.Ct. 1487, 1494, ___ L.Ed.2d ___, ___ (1985). In protecting a parolee's

6. The Supreme Court of Washington did not address the constitutionality of the act of a judge who holds a parole revocation hearing at the time of sentencing a defendant following that defendant's conviction for a felony offense. Nor does this Court address that issue in the instant case.

considerable interest in liberty, a hearing is required, even after a parolee has been convicted of a felony offense sentenced to a term of imprisonment, to avoid an "erroneous evaluation of the need to revoke parole" and to promote rehabilitation by "avoiding reactions to arbitrariness." See note 4, infra, at 4.

One state court has held that due process is not denied when parole is automatically revoked following a parolee's conviction for a felony offense. State ex rel. Bertrand v. Hunt, 308 So.2d 760 (La. 1975). We have examined that court's decision and find that it does not conform to the due process guarantees established by the Supreme Court in *Morrissey v. Brewer*, supra. Therefore, we decline to follow it.

In the instant case, under facts extremely similar to those in *Heinz v. McNutt*, supra, and *In re Akridge*, supra, applicant was convicted of a felony offense prior to his parole revocation hearing. While the trial for that felony offense provided applicant with an opportunity to litigate the facts which eventually formed the basis of his parole violation, applicant has not had an opportunity to litigate the appropriateness of revoking his parole before the parole board or its agent.[7] By denying applicant a hearing in which such an issue could be litigated, the Board of Pardons and Paroles has denied applicant his federal constitutional right to due process. Insofar as Article 42.12, § 22, supra, and § 145.41, supra, authorized the Board to deny applicant such a hearing, they are unconstitutional.

The order revoking applicant's parole is vacated. Applicant is entitled to a final revocation hearing consistent with this opinion should the Board again consider revoking his parole.

It is so ordered.

CAMPBELL, J.

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7. Although the Board informed applicant that he could send "any additional information" before it decided whether to revoke his parole, that process did not rise to the level of the procedural guarantees of personal appearance, presentation of witnesses, confrontation and cross-examination as required by *Morrissey v. Brewer*, supra.

En banc

Publish

Delivered February 11, 1987

Onion, P.J. dissents.

APPENDIX B

Ga. Code Ann. § 42-9-51 (1985) provides, in pertinent part, as follows:

> (a) A parolee who has allegedly violated the terms of his parole or conditional release shall have a right to a final hearing before the board, to be held within a reasonable time after the occurrence of one of the events listed in this subsection. However, a final hearing shall not be required if the parolee or conditional releasee has signed a waiver of final hearing or has been convicted of or entered a plea of guilty or nolo contendere to any crime, whether felony or misdemeanor, in a court of record of this state.
>
> * * * * *
>
> (c) When a parolee or conditional releasee has been convicted of any crime, whether a felony or a misdemeanor, or has entered a plea of guilty or nolo contendere thereto in a court of record, his parole or conditional release may be revoked without a hearing before the board.

Hawaii Rev. Stat. § 353-66 (1976) provides, in pertinent part, as follows:

> No parole shall be revoked and no credits forfeited without cause, which cause must be stated in the order revoking the parole, or forfeiting the credits after notice to the paroled prisoner of his alleged offense and an opportunity to be heard; provided, that when a person is convicted in the State of a crime committed while on parole and is sentenced to imprisonment, or when it is shown by personal investigation that a parolee has left the State without permission from the paroling authority and due effort is made to reach him by registered mail directed to his last known address, no hearing shall be required to revoke his parole; and provided further, that when any duly licensed psychiatrist finds that continuance on parole will not be in the best interests of a parolee or the

> community, the paroling authority, within the limitations of the sentence imposed, shall order the detention and treatment of the prisoner until such time as he shall be found by any duly licensed psychiatrist to be psychiatrically eligible for continuance on parole.

Idaho Code § 20-220 (1979) provides, in pertinent part, as follows:

> Whenever a paroled prisoner is accused of a violation of his parole, other than the commission of, and conviction for, a felony or misdemeanor under the laws of this state, or any other state, or any federal laws, he shall be entitled to a fair and impartial hearing of such charges within thirty (30) days from the time that he is served with charges of the violation of conditions of his parole after his arrest and detention.

Ky. Rev. Stat. § 439.352 (1985) provides, in pertinent part, as follows:

> Recommitment of a parolee to prison on a new sentence received for commission of a crime while on parole shall automatically terminate his parole status on any sentence on which he has not received a final discharge, or a restoration of civil rights, prior to the date of recommitment.

La. Rev. Stat. Ann. § 15:574.10 (West 1981) provides as follows:

> When a person is convicted in this state of a felony committed while on parole, his parole shall be deemed revoked as of the date of the commission of the felony. His parole officer shall inform the sentencing judge of the fact that the convicted defendant is a parole violator. The term for which the defendant shall be imprisoned as a parole violator shall be the same as that provided in cases of revocation of parole for violation of the conditions of parole. The new sentence of imprisonment shall be served consecutively to the term of imprisonment for violation of parole

unless a concurrent term of imprisonment is expressly directed by the court.

Mich. Comp. Laws Ann. § 791.240a (West Supp. 1986) provides, in pertinent part, as follows:

> (1) Within 45 days after a paroled prisoner has been returned or is available for return to a state correctional facility under accusation of a violation of parole, other than the conviction for a felony or misdemeanor punishable by imprisonment under the laws of this state, the United States, or any other state or territory of the United States, the prisoner is entitled to a fact-finding hearing on the charges before 1 member of the parole board or an attorney hearings officer designated by the chairperson of the parole board.

N.Y. Exec. Laws § 259-i(3)(d) (McKinney Supp. 1987) provides as follows:

> (d) If a finding of probable cause is made pursuant to this subdivision either by determination at a preliminary hearing or by the waiver thereof, or if the releasee has been convicted of a new crime while under his present parole or conditional release supervision, the board's rules shall provide for (i) declaring such person to be delinquent as soon as practicable and shall require reasonable and appropriate action to make a final determination with respect to the alleged violation or (ii) ordering such person to be restored to parole supervision under such circumstances as it may deem appropriate or (iii) when a parolee or conditional releasee has been convicted of a new felony committed while under his present parole or conditional release supervision and a new indeterminate sentence has been imposed, the board's rules shall provide for a final declaration of delinquency. The inmate shall then be notified in writing that his release has been revoked on the basis of the new conviction and a copy of the commitment shall accompany said notification. The inmate's next appearance before the board shall be governed by the legal requirements of

> said new indeterminate sentence, or shall occur as soon after a final reversal of the conviction as is practicable.

Okla. Stat. Title 57 § 346 (1981) provides as follows:

> If a paroled convict shall at any time be guilty of a violation of any of the conditions of his parole, he may, upon the order of the Governor, be rearrested and recommitted, without further proceedings, to confinement for the remainder of, and under the terms of, his original sentence.

R.I. Gen. Laws. § 13-8-18 (1981) provides as follows:

> The board may, by a majority vote of all of its members, revoke, with or without hearing, any permit issued by it to any prisoner under the provisions of this chapter, whenever it shall appear to the board that such prisoner has violated any of the terms or conditions of his permit, or has during the period of his parole violated any of the laws of the state, and whenever it shall come to the knowledge of the parole board that any prisoner at liberty under such permit has been guilty of any such violation, the chairman shall issue his warrant to any officer authorized to serve criminal process, to arrest such prisoner and commit him to the adult correctional institutions, to be detained therein until the board shall have an opportunity to determine whether the permit of such prisoner shall be revoked, and if the board shall determine that such permit shall not be revoked, then the board shall forthwith order such prisoner to be set at liberty under the terms and conditions of his original permit.

Wash. Rev. Code Ann. § 9.95.120 (1981) provides, in pertinent part, as follows:

> Whenever a paroled prisoner is accused of a violation of his parole, other than the commission of, and conviction for, a felony or misdemeanor under the laws

of this state or the laws of any state where he may then be, he shall be entitled to a fair and impartial hearing of such charges within thirty days from the time that he is served with charges of the violation of conditions of his parole after his arrest and detention.